BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSEPH D. BARRETT	)	
Claimant	)	
	)	
VS.	)	
	)	
ALLEGIS GROUP, INC. (AEROTEK)	)	
Respondent	)	Docket No. 1,050,109
	)	
AND	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the May 20, 2010 preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders.

ISSUES

The claimant, who had previously injured his low back, slipped and fell on some ice on December 17, 2009, while at work. Following a preliminary hearing, the ALJ awarded claimant medical benefits after finding that the accident accelerated and exacerbated claimant's preexisting back condition.

Respondent maintains the claim for workers compensation benefits should be denied because claimant failed to prove he sustained any injury as there has been no change in his herniated disc at L4-5. In the alternative, respondent argues any aggravation of claimant's preexisting back problem from his accident at work is not compensable under the Workers Compensation Act because such aggravation would be a natural consequence of the preexisting condition.

On the other hand, claimant contends the Preliminary Hearing Order should be affirmed. Claimant maintains he aggravated his back in his fall at work and that accident increased the intensity of his low back pain and also caused pain to radiate all the way into his legs and feet. In addition, claimant asserts that before his accident at work he was able

to perform all of his mechanic duties without any problems, but now he is unable to get on top of the vehicles, crawl inside them, or get up off the floor after being down on his knees. In short, claimant contends his accident at work exacerbated and accelerated his low back condition and, therefore, the accident should be compensable under the Workers Compensation Act.

The sole issue on appeal is whether claimant's present need for medical treatment is related to his accident at work on December 17, 2009, when he fell on the ice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant is a mechanic and repairs track vehicles at Fort Riley. On December 17, 2009, claimant fell on the ice and landed on his back. He was immediately taken to Geary County Community Hospital. Following that accident, claimant began treating with Dr. John E. Ebeling, a neurosurgeon. Dr. Ebeling recommended and scheduled surgery to address a herniated disk in claimant's low back. But the surgery was cancelled when respondent's insurance carrier withdrew authorization. Claimant testified he now has extreme low back pain, pain in his buttocks, and pain radiating into his legs and feet.

Respondent does not challenge that claimant's accident arose out of and in the course of his employment. But respondent disputes that claimant sustained any additional injury to his back that would entitle him to compensation under the Workers Compensation Act as claimant had a herniated disk in his low back before the December 2009 accident.

In 2001, claimant initially injured his back and experienced back pain when he fell 15 to 20 feet off a track vehicle. He saw a doctor or physicians assistant on one occasion and was given Motrin. Claimant maintains the pain he experienced in 2001 was completely different than what he now experiences as he never had pain going into his legs and the back of his calves and into his feet.[1] He also asserts that after the 2001 accident he was able to perform all of his job duties as a mechanic without difficulty. Claimant testified, in part:

> Well, before the [December 2009] accident I could do my physical work at work a hundred percent, no problems. Up and down vehicles all day long. I could crawl around inside the vehicles. After the accident, I barely can get on top of vehicles without any radiating pain. Can't get down on my knees anymore, can't get up off the floor.[2]

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[1] P.H. Trans. at 9.

[2] *Id.* at 11-12.

The records from the Veterans Administration (VA) help to clarify claimant's medical status before his December 2009 fall at work. Those records indicate claimant saw a VA doctor in late October 2008 with lower back, groin, lower abdomen, and bilateral leg pain. The history from the October 20, 2008, progress notes reads:

> He has a number of meds and would like to start using the VA Pharmacy. He has had lower back pain for on [sic] month with pain bilat legs (Groin) into testicles and lower abdomen. No urgency, No pain with urination or defecation and it feel [sic] sbetter [sic] if he moves around.[3]

The MRI study the VA Hospital did in late November 2008 showed claimant had a moderate to large central left disk herniation at the L4-5 level that moderately indented the thecal sac. Upon reviewing the results of the MRI study, the staff physician recommended pain management, physical therapy, and possible surgery if the former modalities proved unsuccessful.

Claimant returned to the VA Hospital in late December 2008. The history recorded for that visit indicates claimant had experienced low back pain since his 2001 accident. Moreover, the doctor noted that claimant had no muscle spasm, no scoliosis, and it was questionable whether claimant was experiencing radiculopathy. Nonetheless, the VA doctor recommended evaluation by a neurosurgeon for possible surgery. Claimant, however, testified the neurosurgeon refused to see him.

After an initial failed attempt to inject claimant's spine, on February 23, 2009, claimant underwent the first of two steroid injections in his low back. The history recorded for that visit reveals additional information regarding claimant's symptoms following his 2001 accident. The doctor noted, in part:

> This 29-year-old gentleman has a history of chronic lower back pain which radiates down to both of his legs secondary to herniated disk at L4-5 level. This patient injured his back when he jumped from an armored vehicle in 2001, and since then he is having this lower back pain off and on, and it is getting worse over the years. The MRI of the lumbar spine did show herniated disk at L4-L5 level and to the smaller extent at L5-S1 levels. This patient was referred to me for conservative treatment prior to considering any surgical intervention.[4]

In mid-August 2009, claimant returned to the VA Hospital for a second epidural injection. The doctor noted the first injection had helped claimant for approximately 6 weeks. Claimant indicated the last epidural steroid injection resolved his symptoms. Nonetheless, progress notes dated September 1, 2009, indicate:

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[3] *Id.*, Resp. Ex. B at 7 (Oct. 20, 2008 progress note at 1).

[4] *Id.*, Resp. Ex. B at 18 (Feb. 23, 2009 progress note at 1).

> He is in with Lower Back Pain not relieved by LESI x3. He does not want to do any more LESI's the last one was painfull [sic] and caused him pain in perineum. He has trouble sleeping at night and might get 3-4 hours of sleep due to back pain. He was taking Tramadol but it caused constipation and upset stomach so he had to stop it.
> Current med regiment was reviewed.
> He is working as a Tank Mechanic at Ft. Riley and this aggravates his pain and he has had to miss 4 days of work in the past one month due to back pain. [H]e is wanting to change jobs and is trying to get into Voc Rehab.[5]

The next entry in the VA Hospital records, however, contrast claimant's condition before and after his December 2009 fall at work. Those progress notes, which are dated December 21, 2009, indicate claimant's pain was significantly worse following the fall on the ice and that he was having pain radiating into his legs. The physical examination on that date indicated claimant was having acute muscle spasms in his spine causing a straightening of his spine, limited range of motion, and an altered gait.

Likewise, the March 5, 2010, medical report of Dr. John D. Ebeling, who claimant consulted shortly after his fall at work, indicates the accident aggravated claimant's symptoms and that claimant should consider a discectomy. That report also indicates that claimant desired to pursue the surgery. Physical therapy notes included with those records indicate that before the December 2009 accident claimant had good and bad days but following the accident claimant's symptoms were increased and more constant.

At his attorney's request, claimant was evaluated by Dr. Pedro A. Murati. The doctor examined claimant in late April 2010 and concluded that claimant had low back pain with signs and symptoms of radiculopathy and bilateral sacroiliac joint dysfunction, both of which the doctor related to claimant's December 2009 accident. Dr. Murati also recommended a consultation with a neurosurgeon for surgery.[6]

In contrast, Dr. James S. Zarr examined claimant at respondent's request and agreed that claimant's fall on ice exacerbated his back condition. The doctor, however, pointed out that the December 2009 fall did not herniate claimant's disk and, therefore, the fall was not the cause of his surgery.[7]

The ALJ considered the above evidence and determined claimant had aggravated his back in the December 2009 accident and, consequently, granted claimant's request for medical benefits. The undersigned Board Member agrees.

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[5] *Id.*, Resp. Ex. B at 22 (Sept. 1, 2009 progress note).

[6] *Id.*, Cl. Ex. 2 at 1-2 (Dr. Murati's Apr. 28, 2010 IME report).

[7] *Id.*, Cl. Ex. 3 at 3 (Dr. Zarr's May 14, 2010 report).

The undersigned finds the evidence is fairly overwhelming that the incident at work aggravated the symptoms claimant was having in his low back and his legs. And because of those increased symptoms claimant elected to undergo surgery.

When dealing with preexisting medical conditions, the test is not whether the accident at work caused or created the condition but, instead, whether the accident aggravated or accelerated the condition. The Kansas Supreme Court in *Strasser*[8], wrote in pertinent part:

> The workmen's compensation act prescribes no standard of health for workmen, and where a workman sustains an accidental injury arising out of and in the course of his employment he is not to be denied compensation merely because of a pre-existing physical condition, for it is well settled that an accidental injury is compensable where the accident serves only to aggravate or accelerate an existing disease or intensifies the affliction.[9]

Indeed, the Workers Compensation Act specifically provides that workers are entitled to receive compensation when preexisting conditions are aggravated but the compensation received for such aggravation is reduced by the amount of preexisting functional impairment.[10] The Act also defines an injury as any lesion or change in the physical structure of the body. But the Act specifically provides "[i]t is not essential that such lesion or change be of such character as to present external or visible signs of its existence."[11]

Without the December 2009 accident occurring, there is no way to estimate how long claimant could have avoided undergoing back surgery to address the herniated disk in his low back. It is possible claimant could have avoided back surgery entirely and let nature address the herniated disk. But there is little question that the symptoms claimant experienced following his slip and fall on the ice and the resulting impairment prompted claimant to consider and elect back surgery. In short, at the very least the accident increased claimant's symptoms and hastened claimant's surgery.

In summary, the undersigned finds claimant sustained personal injury by accident arising out of and in the course of his employment on December 17, 2009. Moreover, claimant has established his present need for medical treatment for his back and radicular symptoms is related to his accident at work and, therefore, the preliminary hearing Order should be affirmed.

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[8] *Strasser v. Jones*, 186 Kan. 507, 511-12, 350 P.2d 779 (1960).

[9] *Id.*, Syl. ¶ 2.

[10] See K.S.A. 44-501(c).

[11] K.S.A. 44-508(e).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[13]

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 20, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
John R. Emerson, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

[12] K.S.A. 44-534a.

[13] K.S.A. 2009 Supp. 44-555c(k).